

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

GEORGE H. BYRNE
KATHLEEN L. BYRNE

CASE NO. 92-01765

Debtors

APPEARANCES:

RICHARD CROAK, ESQ.
Office of U.S. Trustee
10 Broad Street
Utica, New York 13501

MARTIN, MARTIN, PIEMONTE
& WOODARD, ESQS.
Attorneys for Debtor
One Lincoln Center
Syracuse, New York 13202

LEE WOODARD, ESQ.
Of Counsel

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the motion of the United States Trustee ("UST") for review of a fee charged by Debtors' former attorney, Roy S. Sanders, Esq. ("Sanders") in connection with the preparation and filing of this Chapter 7 case.

The relief sought came before the Court at its motion term held at Syracuse, New York on February 9, 1993 as part of a motion to revoke a prior oral order of this Court dismissing Debtors' Chapter 7 case.

Appearing in support of the motion were the UST and Martin, Martin, Piemonte & Woodard, Esqs., Lee Woodard, Esq., of counsel ("Woodard"), Debtors' present attorneys.

The Court granted that portion of the motion seeking to vacate its oral order of dismissal, but reserved on the request to review Sanders' attorney's fees.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction of this contested matter pursuant

to 28 U.S.C. §§1334(b) and 157(a), (b)(1) and (2)(A).

FACTS

The Debtors commenced their voluntary case pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") on June 1, 1992. On or about August 19, 1992, the UST filed a motion to dismiss the case pursuant to Code §707(b). The UST's motion appeared on the Court's August 25, 1992 calendar and was granted without opposition.

Thereafter, and prior to submitting the written order of dismissal, the UST filed and served the instant motion, conceding that its prior motion had been untimely served. The UST further acknowledged that Sanders had requested an adjournment, in writing, of its August 1992 motion, however, Sanders' letter had not been received by the UST until three days after the motion had been orally granted. It is further alleged that the Debtors had contacted the UST and asserted that they would like to consider converting their case to one under Chapter 13 of the Code, but had not been advised of that option by Sanders.

Woodard, on behalf of the Debtors, contends that his new clients have indicated a complete lack of knowledge of their bankruptcy proceeding, and their lack of satisfaction with Sanders.

Finally, the UST asks the Court to examine Sanders' fee pursuant to Code §329.

DISCUSSION

Code §329(a) permits a bankruptcy judge to examine any compensation paid by a debtor to his or her counsel, within one year prior to filing, for services rendered in connection with the bankruptcy case.

While not alleged by either the UST or Woodard, the Court takes judicial notice of Sanders' Statement of Attorney Compensation filed with the Debtors' petition, which reflects a fee of \$850.00 having been paid by the Debtors prior to the filing of their Chapter 7 case.

Unfortunately, neither the UST nor Woodard provide the Court with any

factual basis upon which it might review Sanders' fee. The Court is without any affidavit by the Debtors as to what actual services were rendered by Sanders and Sanders has chosen not to respond to the motion.

The Court believes that the burden of proof is upon the UST and it has chosen to meet that burden by generally inferring that Sanders failed to inform the Debtors of their option to convert their case to Chapter 13 and failing to appear in response to its admittedly untimely Code §707(b) motion.

Woodard's Affidavit submitted in support of the UST's motion is likewise very vague and inferential and clearly neither meets the burden of proof nor shifts it to Sanders.¹

The Court having been provided with nothing more than inference and innuendo is neither inclined nor reasonably able to conduct its own independent investigation of Sanders' fees. Therefore, the Court denies that portion of the UST's motion which seeks a review of counsel fees pursuant to Code §329(a).

IT IS SO ORDERED.

Dated at Utica, New York
this day of February, 1993

STEPHEN D. GERLING
U.S. Bankruptcy Judge

¹ Though entitled an Affidavit, Woodard's Statement is unsworn and fails to constitute even an affirmation.